handing over of the insurance policy is not a condition precedent to constitute a valid sale. However, the non-delivery of such documents with the car may well be construed to mean that they were being withheld pending the fulfilment of a condition which, in a case where a part of the purchase price has been paid, can only be the payment of the balance of the purchase price.

The important thing is to ascertain the nature and effect of the document. I have therefore to consider not only the text of the agreement but also such other evidence as helps to explain its nature and effect, so long as such other evidence does not seek to contradict, vary, add to or subtract from its terms. The task of the court is to extract the intention of the parties both from the terms of their written agreement and from the circumstances which surround and follow it. Thus the evidence relating to the circumstances under which Karim obtained possession of the car is relevant and therefore admissible. The criterion is the true construction of the agreement between the parties. *Halsbury* (3rd edition) Vol. 34 at page 21 says:

"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price; and although a contract may be clothed with the form of a contract of sale; or may contain terms implying that it is a contract of sale, if, on its true construction, it appears to be some other kind of contract, effect will be given to it as such, and the provisions of the Sale of Goods Act, 1893, will not apply. Unless the context or subject matter of that Act otherwise requires, a buyer means a person who buys or agrees to buy goods. Accordingly, there must be a consent to buy as well as a consent to sell goods, otherwise the agreement, unless void for want of consideration, is a mere option to buy, and the Act is not applicable thereto until the option to buy is exercised and the contract of sale thus created. A contract for sale may be between one part owner and another and may be absolute or conditional."

It is to be observed that the agreement in the present case provided that "in the event of the purchaser's failing to pay the balance, the vendor shall have the right to seize the car and forfeit the deposit paid by the purchaser." That clause in the agreement, in my judgment, clearly indicates that there was no intention on the part of the vendor to part with property in the car to the purchaser until the full purchase price was paid. It seems clear therefore that the contract here was an "agreement to sell" or a conditional contract of sale, the condition to be fulfilled being the full payment of the purchase price. This is further borne out by the evidence of Ng Kah Chee that the car was sold on hire-purchase and that D.6 was a temporary sale agreement. There is also the letter dated 19th July, 1962 from Lau Teck Siew to the plaintiffs' solicitors in which it was stated that the car was lent to Mr. Hashim bin Mohamed Nor on his permission on 7th March, 1961. It is true that Lau Teck Siew did not know the terms of the agreement between his company and Hashim bin Mohamed Nor when he wrote that letter, but he has stated that he wrote it after obtaining the necessary information by telephone from the manager at Malacca. In the face of that evidence I do not see how it can be argued that Karim became the owner of the car on 9th February, 1961.

There is abundant evidence in this case as to the nature of the transaction between the parties in relation to the car. As I have stated above, Ng Kah Chee calls it a sale on hire-purchase. In view of what happened after the agreement was signed and the car delivered to Karim, it would not be inappropriate to call the agreement an incipient hire-purchase agreement. Karim has testified that he signed a number of documents on 9th February, 1961. All the indications are that he signed the proper hire-purchase agreement (D.7) on the same day, although the other parties to that hire-purchase agreement did not sign it until 17th March, 1961 when the trading company transferred the car to the finance company. Karim, of course, knows very little about this hire-purchase agreement. This is not surprising. As stated by Lord Justice Harman in *Yeoman Credit, Ltd.* v. *Apps* [4]:

"The difficulty and the artificiality about hire-purchase cases arise from the fact that the member of the public involved imagines himself to be buying the article by instalments from the dealer, whereas he is in law the hirer of the article from a finance company with whom he has been brought willy-nilly into contact, of whom he knows nothing and which, on its part, has never seen the goods which are the subject-matter of the hire."

In view of what I have stated above and in view of the fact that the trading company regarded themselves as the owners of the car until they transferred it to the finance company with whom Karim was brought willy-nilly into a contract of hire-purchase, Lau Teck Siew had an insurable interest in the car on the date of the accident and the car was being driven by Karim on the implied orders or with the implied consent and permission of Lau Teck Siew. The defendants are therefore liable under their contract of insurance. There will be judgment for the plaintiffs for $2,777.55 together with interest as prayed and costs.

Judgment for the plaintiffs.

Solicitors: *Murphy & Dunbar; Sault, Keith Sellar & Co.*

KERSAH LA'USIN v. SIKIN MENAN

[O.C.J. (Raja Azlan Shah J.) February 18, 1966]

[K.L. — Civil Suit No. 151 of 1964]

Land Laws — Sale of land — Unregistered transfer — Purchaser obtaining a right in contract — Death of purchaser — Whether right devolves on administrator — Laches.

The plaintiff claimed a declaration that he was the beneficial owner of a piece of land in Sabak Bernam, Selangor. The land belonged to his mother, who died in 1938, and he was the sole beneficiary. He agreed to sell the land to the defendant's father and a memorandum of transfer of the land was executed in the required form before an Assistant Collector of Land Revenue. The transfer could not be registered as the land was still in his mother's name. The land was occupied by the defendant's father and his family. The plaintiff applied for distribution of his mother's estate but at the date of hearing he was absent and letters of administration of the estate was granted to the defendant. The plaintiff issued the writ against the defendant as administrator of his mother's estate. The defendant counterclaimed for delivery of the title deeds.

Held: (1) there had been an agreement for the sale of the land in this case and the defendant's father and his family had gone into possession of the land as a result of the agreement;

(2) the unregistered transfer of the land gave the purchaser a contractual right which on his death vests in his personal representative;

(3) there had been no laches on the part of the defendant who was in possession of the land and he was entitled to delivery of the title deeds so that he could perfect his title to the land.

Cases referred to:—

(1) *Brickles* v. *Snell* [1916] 2 A.C. 599.

(2) *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A.C. 491.

(3) *Haji Abdul Rahman & Others* v. *Mohamed Hassan* [1917] A.C. 209.

(4) *Haji Osman bin Abu Bakar* v. *Saiyed Noor* [1952] M.L.J. 37 at p. 38.

(5) *Bachan Singh* v. *Mahinder Kaur and others* [1956] M.L.J. 97 at p. 98.

(6) *Tan Ah Boon* v. *State of Johore* [1934] M.L.J. 142 at p. 151.

(7) *Williams* v. *Greatrex* [1957] 1 W.L.R. 31.

(8) *Crofton* v. *Ornsby* (1806), 2 Sah and Lef 583.

CIVIL SUIT.

S. T. Gamany for the plaintiff.

Defendant in person.

Cur. Adv. Vult.

Raja Azlan Shah J.: This case is of some significance as it involves important principles of law. The plaintiff is asking for a declaration that he is the beneficial owner of the land comprised in Extract from the Mukim Register No. 307, Lot 237 Mukim of Sungei Panjang in the District of Sabak Bernam in the State of Selangor (hereinafter referred to as the said land) and other consequential relief. His case is based on the following premises. His mother owned the said land. She died in 1938. He is the sole beneficiary of his mother's estate which comprised the said land only. In September 1940 he entered into an agreement with the defendant's father (since deceased) to sell the said land for a consideration of $400. Both duly executed a memorandum of transfer in the required form before the Assistant Collector of Land Revenue who attested it. The plaintiff now claims that as the E.M.R. 307 was still in his mother's name he could not perfect the purchaser's title. He therefore testified that as a result the collector returned to him the document of title and to the purchaser the purchase price. He took no steps to register his name in the E.M.R. until December 1961 when he applied for distribution under the Probate and Administration Enactment. From the time of his mother's death till the time of the said application he had left the said land which he claimed was looked after during that period by his sister and later by his nephew. The hearing eventually was fixed in February 1963 on which day he was absent. The defendant was granted letters of administration of the estate. In August 1963 the plaintiff entered a caveat and in February 1964 he issued this writ against the defendant as administrator of his mother's estate.

The defendant claimed that the said land was sold to his late father in September 1940. The memorandum of transfer was duly executed and was attested by the Assistant Collector of Land Revenue. The registration of the memorandum of transfer could not be effected as the document of title was with the plaintiff and he had failed to bring it with him. His father died in May 1941. In his defence the defendant avers:

Para. 1. The defendant then never knew the plaintiff's whereabouts and his occupation until the defendant received a letter from the plaintiff's solicitors, Messrs Rajendra & Teik Ee, some time in November 1963.

Para. 2. The defendant objects as the plaintiff had sold the land under EMR. 307 Lot No. 237 in the Mukim of Sungei Panjang, in the District of Sabak Bernam, to defendant's late father, Menan bin Yet then of Sungei Panjang, Sabak Bernam, for $400 cash when the said land was under blukar and uncultivated. The plaintiff executed a memorandum of transfer of the said land in favour of the defendant's father, Menan bin Yet (for the whole share) who was then alive before the Collector of Land Revenue, Sabak Bernam, on the 26th day of September, 1940, and the same was duly stamped on the 30th day of September, 1940, at the Stamp Office, Sabak Bernam. The registration of memorandum of transfer could not be accepted by the Land Office, Sabak Bernam, then as the title deed of the said land was not left in the Land Office, Sabak Bernam, and was in the hands of the plaintiff. The defendant's late father then sought for the title deed from the plaintiff, but the plaintiff was found to have shifted to some other place outside Sabak Bernam unknown to the defendant's late father and the defendant's family. The plaintiff left Sabak Bernam with all his family.

Para. 4. Since then the defendant's father and family cultivated the said land and planted it with coconuts and enjoyed the income derived from the said land without any hindrance, objection or claims by the plaintiff or anyone. The defendant had been paying the quit rent annually except for the year 1962, 1963 and 1964 in which the quit rent was paid in the early part of the year by someone unknown to the defendant.

Para. 6. The defendant prays that all the claims of the plaintiff be rejected and that the plaintiff be ordered to deliver the Title Deed of the said land to the defendant.

The defendant was not represented and he seems to be an illiterate kampong dweller. He

testified to the same effect as that pleaded. He said that the family lived on the said land, developed it with coconut trees and derived benefits from it since 1940. He paid quit rents up to 1960. The defendant was able to produce three receipts in respect of payment of quit rents, i.e. for 1955, 1957 and 1958. The rest, he said, could not be traced. He appeared to be a straightforward and honest witness and I accept his evidence on the point. The defendant brought the Assistant Collector of Land Revenue, before whom the plaintiff and his father had executed the memorandum of transfer and which was attested by that collector, as a witness. The collector deposed that both the plaintiff and the defendant's (deceased) father came before him and executed the memorandum of transfer in his presence and he attested the same. He further said that the deceased gave $400 in cash to the plaintiff in his presence, and later both left his office. After seeing him in the witness box I feel there is no reason to disbelieve him. In cross-examination he said:

"There was a petition for letters of administration in respect of the estate of Temah by Kersah before the execution of the memorandum of transfer. I was shown by Kersah the order of the Collector of Land Revenue giving him the land. That register was destroyed by fire during the occupation by the anti-Japanese forces".

In the absence of further proof to that effect and in the light of the fact that the defendant was granted administration of the estate I have no alternative but to assume that no letters of administration were granted to the plaintiff in respect of his mother's estate.

On the balance of probabilities I have come to the inescapable conclusion that there was an agreement between the two parties to sell the said land for a consideration of $400 and that the purchase price had been paid to the vendor. It was an agreement for a sale of land simpliciter and time was not of its essence. The fact that the defendant's family went into possession of the said land, developed it, and had derived benefits from it for the last 20 years without interference from the plaintiff or his caretakers (that is, his sister and nephew) and the payments of quit rent up to 1960 are acts as were necessary and relevant to show that they were in possession of it. These circumstances do indicate that they went into possession as a result of the agreement and their possession was referable to that agreement.

The first consideration is whether the plaintiff could enter into a contract with the defendant's (deceased) father involving a subject matter which was then not subsisting in the sense that the said land was still in his mother's name. It is not disputed that he was the sole beneficiary and that he was in such a position that when the time came he could perfect the title of the purchaser. The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself an answer to a suit of specific performance by the purchaser: *Brickles* v. *Snell.*[1] Actual possession of both the legal estate and any equitable rights are not prerequisites so long as the vendor is in such a position that when the time for completion comes he will be in a position to pass on the title to the purchaser. In those circumstances the contract is good but only in equity.

The next question is: what significance does such a contract possess under a system of law requiring registration of title? In both the Privy Council decisions it was held that an unregistered transfer of land gives the purchaser a right which rests in contract: *Loke Yew* v. *Port Swettenham Rubber Co.*,[2] *Haji Abdul Rahman & Ors.* v. *Mohamed Hassan.*[3] In 1952 Pretheroe Ag.C.J., in delivering a judgment of the Court of Appeal in *Haji Osman bin Abu Bakar* v. *Saiyed Noor* [4] applied the principle enunciated in *Loke Yew's* case. In 1956, Thomson J. (as he then was) in his usual way, stated the matter emphatically and concisely in *Bachan Singh* v. *Mahinder Kaur & Ors.*: [5]

"Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code which has the same effect in our law as appearance before the Praetor in the law of Rome, delivery of seisin in the old English feudal law and infeftment by registration in the Register of Sasines in the modern Scots law,"

or according to Thorne J. in *Tan Ah Boon* v. *State of Johore* [6]

"analogous to that of the Roman *Fidei Commisum*, so that the purchaser who has paid the whole of his purchase price has no estate, properly so called, in the land agreed to be purchased, but has rights which rest it contract, and which may or may not, according to the circumstances of the particular case, entitled him to sue and to invoke the equitable principle of specific performance".

The only remaining question is: what happens to the contract *in fieri* when the purchaser dies seven months after the date of contract? Does that right under the contract devolve on his personal representative? In *Haji Osman's* case, *supra*, Pretheroe Ag.C.J. remarked at page 38:

"As death does not avoid a contract of this nature it seems clear that the same principles apply where a proprietor dies and his representative becomes the registered proprietor. As such he can, in my opinion, be compelled to take all steps necessary to give effect to the contract executed by the deceased proprietor".

Thomson J. (as he then was) said at page 39:

"If a purchaser agrees to buy a piece of land and pays the purchase price then subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake he is entitled to a good title to the land and to possession, and the death of the vendor does not abate his rights by one iota".

In that case, the vendor sold a piece of land to a purchaser for $2,250. The purchase price was paid, the transfer was executed by both parties before the collector of land revenue and the transfer together with the document of title was handed by the vendor to the purchaser. The transfer was not presented for registration until some six months after the vendor's death. It was held that the death of the vendor did not avoid the contract; the legal personal representative of such deceased person was trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, was entitled to the land and to possession. It may be that in *Haji Osman's* case it was with reference to the vendor's death that registration was not effected, but in my judgment a contract of this nature is also not abrogated by the death of the purchaser. In this connection I wish to adopt a passage in *Das's* "The Torrens System in Malaya" at page 359:

"A contract of sale is not abrogated by death, bankruptcy or other disability of the vendor (or purchaser) after the signing of the contract but before completion. The rights and liabilities thereunder vest in the legal representative, official assignee or committee appointed by the court, who are bound no less than the vendor (or purchaser) was bound to perform the contract and by all equities which affected the deceased, the bankrupt or other person before disabilitiy".

The editor of *Anson's* "Principles of the English Law of Contract" (22nd ed.) holds a similar view at page 411:

"The general rule is that rights and liabilities under a contract pass, on the death of a party to the contract, to his personal representatives".

I therefore hold that any right which the purchaser had vests in his would-be personal representative.

That is not the end of the matter. The defendant in paragraph 6 of his statement of defence did pray that:

"the plaintiff be ordered to deliver the title deed of the said land to the defendant".

That, to my mind, is in the nature of a counterclaim, though the pleadings do not seem to indicate in express terms. I think I have to consider this aspect of the claim in order to do justice in the instant case. After anxious consideration of the matter I order the plaintiff to deliver the document of title to the defendant as administrator of the estate so that he may take such steps as may be necessary to perfect the (deceased) purchaser's title in his legal personal representative. The plaintiff's claim is therefore dismissed with costs.

It may be argued, perhaps, in due course, that laches or delay may be a bar to the personal representative's claim. In answer I would rely on the case of *Williams* v. *Greatrex*.[7] I need not go into the details of that case beyond saying that it was an action for specific performance of a contract for the sale of land simpliciter made 10 years previously. On behalf of the vendor it was argued that when he repudiated the contract the purchaser ought to have brought an action for specific performance then and there to compel him to perform the contract. Denning L.J. (as he then was) said at page 36:

"A very long time elapsed without his taking the vendor to court. But I think the answer to it is this: once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance".

And in a later paragraph of the same page:

"There is an interesting passage which Mr. Pennant read us from a case in 1806, *Crofton* v. *Ormsby*,[8] in which Lord Redesdale, Lord Chancellor in Ireland, said: 'The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is that species of laches, which will prevail against the equitable title; if I should hold it so, it would tend to overset a great deal of property in this country, where parties often continue to hold under an equitable contract for 40 or 50 years, without clothing it with the legal title. I conceive, therefore, that possession having gone with the contract. there is no room for the objection'. And then he added: 'But, in the present case, there is nothing but a resting on the equitable estate by a person in possession, without clothing it with a legal title, which I think never was held to be that sort of laches that would prevent relief'. Likewise we have here possession which is taken under a contract of purchase with an equitable right to be there. All that needs to be done is for the legal title to be perfected. In such a case, laches or delay is not a bar".

At page 40, Hodson L.J. (as he then was) said:

"What is the position if the plaintiff was in possession? In Fry L.J.'s book on Specific Performance (6th ed. 1921) — which was not, of course, edited by him — at p. 517 it is stated: '1110. Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the court'; and the authority for that proposition is stated to be that of Lord Redesdale in *Crofton* v. *Ormsby, supra*".

Claim dismissed.

Solicitors: *Kam Woon Wah & Co.*